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In the Supreme Court of the United States

OCTOBER TERM, 1973

CON F. SHEA,
EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL.,
PETITIONERS

v.

ASCENSION VIALPANDO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States.

QUESTION PRESENTED

Whether under Section 402(a)(7) of the Social Security Act a state, in determining the level of aid-to-families-with-dependent-children assistance required by families with working members, may use a statistically based estimate of the work expenses that a typical employee may be reasonably expected to incur.

STATEMENT

Pursuant to Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.*, the federal government provides

funds for state programs of aid to families with dependent children, commonly known as AFDC programs. In order to qualify for federal funding a state AFDC program must provide, *inter alia*, that in determining the level of assistance needed by a family the state will "take into consideration any * * * income and resources of any child or relative claiming aid * * *, as well as any expenses reasonably attributable to the earning of any such income * * *." Section 402(a)(7) of the Act, 42 U.S.C. 602(a)(7). This case involves the meaning of the requirement that the state "take into consideration * * * any expenses reasonably attributable to the earning of * * * income." All the states operate federally-funded AFDC programs; it is the Colorado program which is involved in this case, but the issue presented affects most state AFDC programs.

In determining the amount of AFDC assistance to which a family is entitled, it is first necessary to calculate that family's available income. Under Section 402(a)(8), a family with one or more working members is permitted to deduct a work-incentive allowance, commonly referred to as the "earned income disregard," from its income in computing the amount of the AFDC benefit. Similarly, Section 402(a)(7) requires a deduction for work expenses. Under the Colorado program, each working member of the family is permitted a monthly work expense deduction equal to the sum of (1) mandatory payroll deductions, (2) all actual child care expenses incurred in connection with work, and (3) an additional flat amount of thirty dollars designed to cover all other work-related expenses, such as lunches and transportation. The family's available income consists of its gross income as reduced by the earned income disregard and and deduction for work expenses. The amount of the family's benefits is then determined by

comparing its available income with a fixed standard of need for a family of its size. See generally, *Rosado* v. *Wyman*, 397 U.S. 397.

Respondent Ascension Vialpando brought this class suit for declaratory and injunctive relief in the United States District Court for the District of Colorado, challenging the propriety, under the Social Security Act, of Colorado's standard allowance of thirty dollars for work-related expenses. She claimed that her monthly work-related expenses, exclusive of mandatory payroll deductions and child care expenses, exceeded thirty dollars and that the application of the standard allowance to her therefore resulted in an overstatement of her available income and, consequently, in a wrongful deprivation of benefits to which she was entitled under the Act.

The district court granted summary judgment for respondents (Pet. App. C). The court read Section 402(a)(7) as requiring Colorado to compute the work expense deduction of each employed beneficiary on the basis of his own itemized expenses, and as barring the use of a standard allowance for work expenses (Pet. App. D; see also Pet. App. B). The court declared Colorado's standard work expense allowance invalid under the Act and enjoined its use by petitioners.[1] The court of appeals affirmed (Pet. App. A).

DISCUSSION

1. a. The Secretary of Health, Education, and Welfare supports Colorado in this suit. It is the position of

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[1] The injunction apparently bars petitioners from using the standard allowance even where it exceeds a claimant's itemized expenses. See Pet. App. C, p. C-2.

the Secretary that Section 402(a)(7) of the Act permits the use of mandatory standard work expense allowances based upon statistical determinations of the work expenses that a typical employee may be reasonably expected to incur. This view has evolved over time, in recognition of the practical necessities of administration. Thus in 1964 the Secretary took the position that whereas standard allowances could be used for purposes of administrative convenience, an employed beneficiary was entitled to a higher work expense deduction "when there is determination that such [higher] expenses do, in fact, exist in the individual case." HEW, *Handbook of Public Assistance Administration* Part IV, §3140 (Pet. App. F, p. F-2). However, this handbook provision was superseded in 1969 by regulations (45 C.F.R. 233.20) that essentially restate the statutory language without discussing the extent to which standard work expense allowances may be used.[2] The use of mandatory standard work expense allowances was being approved in 1969. See the September 26, 1969 letter of Commissioner Simonds (Pet. App. G). For the last several years, the practice of the Secretary has been to approve state AFDC programs employing mandatory standard work expense allowances "where there has been a factual justification of the reasonableness of the flat amount [of the allowance]" (May 15, 1972 letter of Acting Associate Regional Commissioner Skillern; Pet. App. H, p. H-2).

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[2] Respondents contend (Resp. Br. in Opp. 12-13) that these regulations require case-by-case determinations of actual expenses. However, the Secretary has never interpreted the regulations to require such determinations, and the Secretary's construction of his own regulations is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16-18.

b. Most state AFDC programs now include some form of mandatory standard work expense allowance. According to a departmental survey of state plans, twenty states, including Colorado, use a standard work expense allowance in combination with actual child care expenses and, in some cases, mandatory payroll deductions; an additional fifteen states use other systems of mandatory standard allowances for one or more major items of work expense.

This shift to mandatory standard allowances is grounded primarily in considerations of administrative convenience.[3] The use of such allowances eliminates the need for separate legal judgments and factual determinations on a case-by-case basis; this greatly simplifies and expedites the processing of benefit claims and significantly reduces the administrative workload and expenses.[4] Standard allowances also facilitate automation of computation and payment processes and minimize the likelihood of computational error.

c. The courts below acknowledged that there may be important practical reasons for using mandatory standard work expense allowances. They nevertheless concluded that the language of Section 402(a)(7) and its legislative history reveal a clear Congressional

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[3] Use of standard allowances based upon statistically determined averages does not affect the total amount of benefits distributed by a state. Thus a state's only interest in using such allowances is in the improvement of program efficiency.

[4] The County of Los Angeles, California, Department of Public Services has informed the Secretary that it has determined, on the basis of work measurement studies, that the use of mandatory standard work expense allowances would permit a staff reduction of over 30 employees at an annual savings in excess of $400,000.

intention of requiring case-by-case determinations of actual work expenses. We disagree.

The statute provides that a state "shall, in determining need, take into consideration * * * any expenses reasonably attributable to the earning of * * * income." This language falls short of requiring an individually-itemized work-expense deduction. We believe that work expenses may be "take[n] into consideration" by providing the same standard allowance for all employed beneficiaries. The statutory phrase "take into consideration" is flexible and, as the court of appeals below recognized (Pet. App. A, p. A-4), "by itself does not require a particular treatment of employment expenses."

The court of appeals reasoned, however, that since that statutory phrase applies not only to work expenses but also to income, which obviously must be determined on an individualized basis, the statutory context requires individualized itemization of work expenses as well. But this approach to statutory construction overlooks the fact that a single word or phrase often takes on different meanings for each of its objects within the same sentence.[5]

Moreover, as Blackstone noted long ago (1 Blackstone, *Commentaries* 59 (Philadelphia, 1866)), "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made * * *." The provisions in Section 402(a)(7) relating to income and work expenses were enacted separately. The original statutory requirement

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[5] For example, one might say of a hunter and canoeist that "he shoots both squirrels and rapids." We see no reason why "take into consideration," any more than "shoots," must necessarily have the identical meaning as to each of its objects.

that "income" be taken into consideration was designed to ensure that the respective incomes of all members of the family be considered in assessing the family's need; the clear "will of the legislator" was that the particular family's actual income was to be computed. After several years' experience with AFDC programs, Congress then amended the statute (Section 106 of P.L. 87-543, 76 Stat. 188) to require that work expenses be considered in determining need; this was done in recognition of the fact that families with working members incur not only the family living expenses normally included within the state's standard of need but additional work-related expenses as well.

Congress was aware that work expenses were simply additional items of living expense incurred by virtue of employment: as the Senate Finance Committee noted in recommending passage of the work expenses amendment, "if these work expenses are not considered in determining need, they have the effect of * * * reducing the amount available for food, clothing, and shelter." S. Rep. No. 1589, 87th Cong., 2d Sess., at 18. It has therefore been the judgment of the Secretary that work expenses may be taken into consideration by the states in the same manner as other living expenses, *i.e.*, "on the basis of statistical averages." *Rosado* v. *Wyman*, 397 U.S. 397, 419.

This construction of the statute satisfies both the specific legislative purpose of ensuring consideration of the special needs of families with working members and the more general objective of efficient administration. And it is, of course, a long-standing principle of statutory interpretation that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that

it is wrong." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381.

In rejecting the Secretary's construction, the courts below stressed that the statute requires "any" work expenses to be taken into consideration and that the report of the Senate Finance Committee indicated that such expenses were to be taken "fully into account." We do not believe that the words "any" and "fully" support the conclusion of the courts below. The Secretary does not construe the statute as permitting an arbitrary work expense allowance; under the Secretary's construction, to be valid, an allowance must be based on a statistically determined average. If the full range of reasonably foreseeable work expenses is included in the statistical base, the allowance so determined meets all legislative objectives reasonably implicit in the requirement that "any" expense be taken into consideration; and the legislative history relied upon by respondents shows nothing more than a congressional intent that a state choosing to use a standard work expense allowance must consider all likely work expenses, *i.e.*, "take these expenses fully into account" (S. Rep. 1589, No. *supra*, at 18), in establishing that allowance.

2. Notwithstanding the fact that, in our view, the case was wrongly decided below, there are two factors that may appear to militate against further review. First, as all parties agree, there is as yet no conflict among the courts of appeals on the issue presented. However, this issue is being actively litigated in the district courts (see Pet. 13-14, nn. 4 and 5) and there is therefore a substantial likelihood that a conflict may develop. Second, the Administration has sponsored a legislative proposal, S. 2311, that would, if enacted, in effect require the states to employ a standard work expense

allowance of the type now being used voluntarily by Colorado. The prospect of congressional action is of course uncertain; hearings have not yet been scheduled for consideration of the bill, which is pending in committee.

We nevertheless believe that this case is appropriate for review. The question presented affects the AFDC programs of at least thirty-five states and has been decided contrary to the Secretary's reading of the statute. This case therefore raises "an important question of federal law which has not been, but should be, settled by this court." Rule 19(1)(b) of the Rules of this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.

OCTOBER 1973.